RECORD AND BRIEF

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IN THE

Supreme Court of the United States

LESTER GERARD PACKINGHAM,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The National Association of Criminal Defense Lawyers ("NACDL") submits this brief as *amicus curiae* in support of petitioner.[1]

INTEREST OF *AMICUS CURIAE*

NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have provided blanket consent to the filing of *amicus* briefs in support of either party or neither party.

present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in this case as NACDL is committed to combatting the proliferation of collateral consequences that deprive convicted persons of fundamental rights without a sound basis in law.

INTRODUCTION AND SUMMARY OF ARGUMENT

The provision at issue in this case, North Carolina General Statute § 14-202.5, makes it a felony for persons on the state's sex offender registry to "access" any social networking website, if the person knows that individuals under the age of 18 are permitted to use the site. In relevant part, the statute defines a "social networking Web site" as one that "[f]acilitates the social introduction between two or more persons for the purpose of . . . information exchanges," allows users to create "personal profiles," and provides users "mechanisms" for communication. N.C. Gen. Stat. § 14-202.5(b).

Petitioner J.R. Packingham was convicted under § 202.5 for posting a message on Facebook praising God for the dismissal of a traffic ticket. The Supreme Court of North Carolina upheld petitioner's conviction against his constitutional challenge, holding that any burden imposed on petitioner's First Amendment rights was no greater than necessary to further the government's interest in protecting children.

Section 202.5 is one of a growing number of federal and state laws that effectively impose criminal punishments outside the normal, individualized

criminal sentencing process, categorically stripping citizens of constitutional rights with little or no effort to tailor the restraints they mandate to the objectives they purport to serve. These punishments in many instances would not survive due process review even if they were explicitly imposed as actual sentences on identified individuals for specific criminal conduct. As "hidden sentences"[2] mandated for a broad range of conduct, with no necessary connection to the conduct they punish, the due process violation is all the more palpable, and all the more intolerable.

A recent NACDL report catalogs and critiques the trend toward expanding criminal punishment outside the sentencing process, even though the sentencing process has not proved to be in any way deficient in identifying punishments that "fit the crime." *See* NACDL, *Collateral Damage: America's Failure to Forgive or Forget in the War on Crime—A Roadmap to Restore Rights and Status After Arrest and Conviction* (May 2014).[3] This case presents an opportunity for the Court to clarify the constitutional limitations on these hidden sentences—not just the First Amendment-based limitations on the government's power to punish speech that make speech-restrictive laws like § 202.5 particularly vulnerable to constitutional challenge, but the more general limitations that constrain the government's power to impose *any* criminal punishment.

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[2] *See* Joshua Kaiser, Comment, *Revealing the Hidden Sentence: How to Add Transparency, Legitimacy, and Purpose to "Collateral" Punishment Policy*, 10 Harv. L. & Pol'y Rev. 123, 126-27 (2016).

[3] https://www.nacdl.org/reports/.

Collateral consequence laws like § 202.5 raise multiple concerns about whether the punishments they mandate comport with basic due process. First, NACDL is unaware of any evidence—much less valid findings—that the normal criminal sentencing process cannot fully serve the governmental interests underlying the extra-sentencing punishments imposed by collateral consequence laws. If sentencing itself already serves the government's objective, then extra-sentence punishments will be difficult to justify as necessary and appropriate to serve the same objectives.

Second, unlike criminal sentences, which are established for specific crimes and usually are calibrated to the particular facts of the offense and the individual convicted of it, collateral consequence laws generally operate categorically, mandating punishments for large groups of people convicted of a wide range of offenses involving vastly different conduct. For instance, some states broadly bar all persons deemed "sex offenders" from entering libraries in order to protect children, even if the offender's own sex-related crime involved only adults and indicates no greater risk to children than any other crime.

Third, collateral consequence laws are often strict liability offenses—like § 202.5—that impose criminal punishment for specified acts even when the defendant intended no harm. Strict liability offenses traditionally have been limited to regulatory crimes, where the proscription is designed to protect public health and safety. To justify a collateral consequence law on public safety grounds, the law must be carefully drawn to advance that specific regulato-

ry purpose. Many such laws, including § 202.5, are not so circumscribed and thus cannot be defended as merely advancing a rational public welfare objective.

ARGUMENT

The vast expansion of the nation's criminal justice system over the last 40 years has produced a corresponding increase in the number of people with a criminal record. Between 1980 and 2014, the number of Americans incarcerated in state and federal prisons quintupled,[4] and one recent study estimates that 65 million people—roughly one in four adults in the United States—have a criminal record.[5]

For many people who have been convicted of a crime, "the most severe and long-lasting effect of conviction is not imprisonment or [a] fine." Gabriel Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. Pa. L. Rev. 1789, 1791 (2012). Rather, it is the collateral consequences that follow from the conviction and persist even after their sentence has been served. *Id.*; *see* Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 Notre Dame L. Rev. 301, 315 (2015) (collateral consequences may "dwarf an offender's actual sentence in severity or significance").

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[4] *See* The Sentencing Project, *Fact Sheet—Trends in U.S. Corrections* (2015), http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf.

[5] Nat'l Emp't Law Project, *65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment*, at 27 n.2 (March 2011), http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf?nocdn=1.

There are approximately 48,000 laws and rules in U.S. jurisdictions that restrict opportunities and benefits based on criminal convictions. *See* ABA, *National Inventory of Collateral Consequences of Conviction*, (hereinafter "*ABA Inventory*") www.abacollateralconsequences.org/map/.[6] These collateral consequences affect "virtually every aspect of human endeavor, including employment and licensing, housing, education, public benefits, credit and loans, immigration status, parental rights, interstate travel, and even volunteer opportunities." NACDL Report at 12. They bar individuals with criminal records from holding "public positions, from teachers and law enforcement officers to school bus drivers and garbage collectors," and from working in professions "that require licenses—including not only doctors and lawyers, but also barbers, bartenders, plumbers, and beauticians." Kaiser, *supra*, at 133. They deprive people of their rights to vote, to serve on a jury, and to keep and bear arms, and render them ineligible to enlist in the armed forces. *Id.* at 138; U.S. Dep't of Justice, Office of the Pardon Attorney, *Civil Disabilities of Convicted Felons: A State-by-State Survey*, at 6-7, 14 (2d ed. 1996), https://www.ncjrs.gov/pdffiles1/pr/195110.pdf. And

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[6] Some similar consequences can be activated by a mere arrest. *See* Tracy WP Sohoni, *The Effect of Collateral Consequence Laws on State Rates of Returns to Prisons*, at 6 (2013), https://www.ncjrs.gov/pdffiles1/nij/grants/247569.pdf. Others attach even to non-criminal offenses such as disorderly conduct. *See, e.g.*, McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. Tol. L. Rev. 479, 482 (2005) (noting that such a violation "makes a person presumptively ineligible for New York City public housing for two years").

through provisions like § 202.5, individuals convicted of certain types of crimes—like those categorized as "sex offenses"—may find themselves subject to laws broadly restricting their freedom of movement, residency, and employment, Jennifer C. Daskal, *Pre-Crime Restraints: The Explosion of Targeted, Non-custodial Prevention*, 99 Cornell L. Rev. 327, 362 (2014), and denying them lawful access to everyday websites like Amazon, Google, and *The New York Times*, Pet. App. 33a, 51a.

These collateral consequences can have a profound impact on the lives of those to whom they apply. A single individual with a criminal conviction may be subject to more than 2,000 such restrictions upon reentry. Kaiser, *supra*, at 157. And while some collateral consequences are temporary, most are not. *See id.* at 148. The stakes are extraordinarily high for the millions of individuals who are subject to these post-conviction restraints, and this Court's guidance is needed to ensure that such provisions do not exceed constitutional bounds.

A. The Sentencing Process Already Serves The Objectives Underlying Many Collateral Consequence Laws

Although collateral consequences "technically reside outside of the criminal justice system," Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. Crim. L. & Criminology 1213, 1218 (2010), many are plainly punitive in character, *see* Chin, *supra*, at 1830. "Taking away someone's right to vote because they were convicted of a crime," for example, "does not serve any non-punitive, regulatory purpose, such as making society

safer or protecting against voter fraud." NACDL Report at 34; *see also id.* at 14 (observing that many common collateral consequences, including the loss of voting and other civil and judicial rights, "serve no public safety purpose at all"). Provisions denying those convicted of drug offenses access to public benefits like food stamp programs likewise appear to be motivated primarily (or entirely) by a desire to punish that group. *See* The Sentencing Project, *A Lifetime of Punishment: The Impact of the Felony Drug Ban on Welfare Benefits*, at 1 (2015).[7] Such provisions, in effect, amount to "invisible ingredients in the legislative menu of criminal sanctions." Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion, in Invisible Punishment: The Collateral Consequences of Mass Imprisonment* 15, 17 (Marc Mauer & Meda Chesney-Lind eds., 2002).

Punishing wrongdoing is of course an important governmental objective, but fulfilling that objective is generally the office of the criminal *sentencing* process. The sentence imposed for a particular individual and offense reflects a judgment about what restrictions and penalties are necessary to achieve sentencing's traditional purposes: deterrence, incapacitation, rehabilitation, and retribution. *See* Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 Harv. L. & Pol'y Rev. 173, 176-77 (2010). Indeed, in the federal system, judges are expressly instructed to "impose a sentence sufficient, but not greater than necessary" to achieve the

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[7] http://sentencingproject.org/wp-content/uploads/2015/12/A-Lifetime-of-Punishment.pdf.

aims of sentencing: "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," "to afford adequate deterrence to criminal conduct," "to protect the public from further crimes of the defendant," and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a). The same principle underlies sentencing at the state level. *See* Alison Shames, Vera Institute of Justice, *Sentencing Within Sentencing*, 24 Fed. Sent'g Rep. 1, 1 (Oct. 2011) (observing that "in most states, the imposition of a sentence is a regulated process," and—"in all cases—sentence severity is reviewable by a higher court, to ensure that a judge does not impose a penalty that is more than necessary to achieve the accepted goals").

Given that the criminal sentencing process exists solely to serve society's interest in punishing wrongdoing, it should be exceedingly difficult to justify a regime of *extra*-sentence punishments absent substantial evidence that the sentencing process is deficient in some material respect. At the very least, the substantial overlap between sentencing objectives and the purposes animating collateral consequence laws should prompt close scrutiny of post-sentence restrictions, including careful evaluation of whether and how they serve any distinct interest not already fully vindicated in the sentencing process.

B. Unlike The Sentencing Process, Many Collateral Consequence Laws Impose Restrictions Absent Any Consideration Of The Specific Offense Or The Individual Convicted Of It

While many collateral consequence laws share sentencing's aims, they are typically far less precise than the traditional sentencing process in how they go about advancing those goals.

Not only does the criminal sentencing process generally serve society's interest in punishing wrongdoing (as just discussed), it does so by identifying a punishment that is tailored to the particular offense and offender involved. The criminal sentencing process "is designed to impose punishment that is proportionate to the offense." Chin, *supra*, at 1830. It is a "bedrock principle of our sentencing jurisprudence . . . that the severity of the criminal sanction should be limited by the seriousness of the offense and relevant attributes of the offender." Travis, *supra*, at 35. Generally speaking, the more serious and blameworthy a defendant's conduct, the more severe the penalty imposed. And it is not enough that the punishment fit the crime—it also "should fit the offender." *Williams v. New York*, 337 U.S. 241, 247 (1949); *see Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937) ("For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender."). To ensure that it does, the sentencing process is largely individualized, taking into account

the particular facts and circumstances of the crime and the particular attributes of the defendant.

To be sure, over the last several decades, there has been a shift at both the state and federal levels toward structured sentencing schemes aimed at normalizing sentences across defendants. *See* Ely Aharonson, *Determinate Sentencing and American Exceptionalism: The Underpinnings and Effects of Cross-National Differences in the Regulation of Sentencing Discretion*, 76 L. & Contemp. Probs. 161, 162 (2013). But even where the range of available sentences is constrained by statute or guidelines, ordinary criminal sentences are still at a minimum attached to specific crimes that share common attributes. And sentencing tables, "with charge severity on one axis and prior criminal record on the other," are "concrete expressions" of the principle that punishment should be tailored to both the offense and the offender. Travis, *supra*, at 35.[8]

In stark contrast to the crime- and offender-specific approach that prevails in the ordinary criminal sentencing context, collateral consequence laws often deprive people with criminal records of fundamental rights absent *any* individualized assessment of their conduct or even the general characteristics of the offense committed. Such laws place categorical restrictions on individuals convicted of a diverse ar-

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[8] Such tables are used both in federal sentencing, *see* U.S. Sentencing Commission, *Guidelines Manual*, Ch. 5, Pt. A, at 420 (Nov. 1, 2016), http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf, and in many states, including North Carolina, *see* N.C. Court System, Punishment Grids, http://www.nccourts.org/Courts/CRS/Councils/spac/Sentencing/Punishment.asp.

ray of offenses, making no effort to match the punishment to the crime.

For example, many collateral consequences are triggered whenever someone has been convicted of a "felony," regardless of whether the conviction was for armed robbery, arson, or tax evasion. Such provisions include laws depriving millions of people of their rights to vote and possess a firearm. NACDL Report at 34-35; *see also* Travis, *supra*, at 35 ("A felon convicted of the lowest felony loses his right to vote, as does a serial murderer."). Other restrictions apply to those convicted of "crimes involving moral turpitude" or "crimes of violence," categories that likewise encompass a diverse range of conduct, from fraud to rape and extortion to murder. *See ABA Inventory* (database including numerous such provisions).

Even restrictions like § 202.5 that apply only to a group of individuals convicted of the same general type of offense (e.g., "sex offenses") still reach an assortment of underlying offenses involving widely varied facts. *See* N.C. Gen. Stat. § 14-208.6(4). In Oklahoma, for example, registered sex offenders range from persons convicted of violent sexual assaults to those convicted of indecent exposure, but regardless of the crime committed, all persons deemed "sex offenders" are "prohibited from living with a minor child; living within 2000 feet of any school, childcare center, playground, or park; loitering within 500 feet of any school, childcare center, or park; working in any capacity with children; engaging in ice cream truck vending; or living in a residence with another convicted sex offender." Daskal, *supra*, at 349-50 (footnotes omitted); *see also* Travis,

supra, at 35 ("A teenager convicted of statutory rape for consensual intercourse with his underage girlfriend, as well as a repeated child molester, may be subject to life-time registration.").[9] Such broad, categorical restrictions are the norm for these types of laws.

The expansive, often indiscriminate reach of collateral consequences represents an abandonment of the fundamental principle underlying the sentencing process—that punishment should be calibrated to match the characteristics of the crime.

C. Many Collateral Consequence Laws Create Strict Liability Offenses, Which Pass Constitutional Muster Only If They Are Carefully Drawn To Advance Public Safety Objectives

The extraordinary breadth of many collateral consequence laws also raises constitutional concerns because such laws are typically strict liability offenses that impose criminal punishment for specified acts even when the defendant intended no harm. Section 202.5, for example, criminalizes merely accessing a social networking site—broadly defined—without any consideration of whether the person who violated the restriction intended criminal activi-

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[9] If such a teenager later moved to North Carolina, he would be subject to both registration *and* § 202.5's restrictions, as North Carolina's registration requirements extend to individuals convicted of a registrable offense elsewhere, even if the same offense would not trigger registration had it been committed in North Carolina, *see* N.C. Gen. Stat. § 14-208.6(4), and § 202.5 broadly applies to everyone subject to registration under North Carolina law, *see id.* § 14-202.5(a).

ty. Under that law, an otherwise innocent exercise of free expression and religious liberty on Facebook becomes the basis for a Class I felony. *See* N.C. Gen. Stat. § 14-202.5(e).

Strict liability offenses are not favored in American law. Ordinarily, "a guilty mind is a necessary element in the indictment and proof of every crime." *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (quotation omitted); *see Morissette v. United States*, 342 U.S. 246, 250-51 (1952). That principle is so important that even where a criminal statute does not expressly include an intent element, this Court has applied a "background assumption" that the legislature did not intend to dispense with it if "to interpret the statute [without an intent requirement] would be to criminalize a broad range of apparently innocent conduct." *Liparota v. United States*, 471 U.S. 419, 426 (1985).

The Court has recognized a narrow exception to the general *mens rea* rule for regulatory crimes, where the proscription is designed to protect public health and safety. *See Morissette*, 342 U.S. at 254; *see also Staples v. United States*, 511 U.S. 600, 607 (1994) ("Typically, our cases recognizing such [strict-liability public welfare] offenses involve statutes that regulate potentially harmful or injurious items."). "In the interest of the larger good," such provisions "put[] the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." *United States v. Dotterweich*, 320 U.S. 277, 280-81 (1943); *see United States v. Balint*, 258 U.S. 250, 252 (1922).

It is not enough, however, for the government simply to cite public safety as the justification for a post-sentence deprivation of constitutional rights. The government must do more than merely identify an interest that is "important in the abstract." *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 664 (1994). It must show that restrictions on constitutional rights "in fact alleviate" the cited harm "in a direct and material way" and are appropriately tailored to advance the objectives they purport to serve. *Id.* "[T]he mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity. . . . [T]hat inquiry embodies an overarching commitment to make sure that Congress has designed its statute to accomplish its purpose without imposing an unnecessarily great restriction on speech." *Reno v. ACLU*, 521 U.S. 844, 875-76 (1997) (quotation omitted). Thus, even collateral consequence laws that advance legitimate public welfare interests must be drawn with an eye toward that purpose.

Section 202.5 and many similar collateral consequence laws, however, impose restrictions far more expansive than reasonably necessary to advance any public safety objective. As the facts of this case well demonstrate, § 202.5 reaches conduct that presents no threat to public safety and has nothing to do with the state's valid interest in protecting minors. That provision applies to individuals convicted of an array of underlying offenses, many of which do not involve any contact with minors. *See* N.C. Gen. Stat. § 14-208.6(4). And it is far from clear that application of

§ 202.5 to individuals convicted of crimes involving only adult victims does anything to achieve the law's objective of protecting children.

Section 202.5 is by no means unusual in its overreach; many collateral consequence laws are likewise far too expansive to be fully justified on public welfare grounds. Blanket firearm bans applicable to anyone convicted of a felony (which exist under both federal and state law) illustrate the point. While some circumstances may well justify certain restrictions on firearm possession, "there is no evidence that prohibiting an individual with a fraud conviction from possessing a firearm advances public safety." NACDL Report at 35. Similarly, while banning some people who have been convicted of certain types of sex offenses from public housing may advance legitimate public safety goals, under current law "those convicted of public urination in California are barred for life from public housing," even while individuals "convicted of more serious violent offenses are not." NACDL Report at 33. Such results betray the mismatch between the public welfare aims many collateral consequence laws purport to advance and their actual effects.

The salutary objective of protecting public welfare is not a free license for government restriction of constitutional rights and liberties. The sweeping scope of many collateral consequence laws confirms the need for meaningful judicial checks to ensure that such provisions do not exceed constitutional limits.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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